STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 13, 2013
v	No. 308524 Wayne Circuit Court
MERRICK DEMETRIUS NICHOLS, Defendant-Appellant.	LC No. 11-007703-FC

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of unlawful imprisonment, MCL 750.349b, for which he was sentenced as a fourth habitual offender, MCL 769.12, to 58 to 180 months' imprisonment. We affirm.

Defendant's convictions arise from his involvement in holding Bernard Pogue captive over a several-hour period during which he was repeatedly beaten for failing to pay a drug debt. At trial, Pogue testified that defendant, Robert Giles, and William Jenkins all held him captive inside a drug house while trying to force him to pay a drug debt owed to Giles. According to Pogue, he was confined first in the basement and then in a gated upstairs room, during which he was repeatedly beaten by all three men, and then burned with a combination of hot water and grease. Giles's mother, Jackie Giles, also became involved and hit Pogue in the head with a cast iron skillet when he tried to escape. Although defendant was also charged with armed robbery, MCL 750.529, torture, MCL 750.85, and extortion, MCL 750.213, the trial court acquitted him of those offenses and convicted him only of unlawful imprisonment.

Defendant first argues that the trial court erred in denying his postjudgment motion to dismiss for violation of the statutory 180-day rule, MCL 780.131. This issue presents a question of statutory interpretation, which we review de novo as a question of law. *People v Lown*, 488 Mich 242, 254; 794 NW2d 9 (2011).

The statutory 180-day rule provides, in pertinent part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the

> inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail. [MCL 780.131(1).]

The 180-day rule "applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail." *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). "[T]he 180-day period begins to run the day after the prosecutor receives notice that a defendant is incarcerated and awaiting trial on pending charges." *People v Cleveland Williams*, 475 Mich 245, 257 n 4; 716 NW2d 208 (2006). The Department of Corrections must deliver notice to the prosecutor and the notice must comply with other requirements of the statute; delivery of the notice to investigating police officers is not sufficient. *Id*. at 255-256. The defendant bears the burden of showing "that the Department of Corrections caused to be delivered by certified mail to the prosecuting attorney the written notice, request, and statement as required by MCL 780.131(1)." *People v Holt*, 478 Mich 851; 731 NW2d 93 (2007).

In his motion, defendant argued that the 180-day rule was violated because a period of more than 400 days had elapsed between the date of the offense and the date of trial. Although defendant demonstrated a delay in excess of 180 days between the date of his arrest and the date of his trial, he did not show when, if ever, he was returned to prison on the parole violation charge or that the Department of Corrections ever served the requisite notice on the prosecutor. Thus, defendant failed to establish that the statutory 180-day period was ever triggered. While defendant contends that written notice of pending charges from the Department of Corrections is not required when the prosecutor has actual notice of the charges through other means, plain and unambiguous statutory language is to be applied as written. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001). This Court "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Accordingly, defendant has failed to establish an actual violation of the 180-day rule.

Defendant next argues that the trial court erred in scoring the sentencing guidelines. "This Court . . . reviews a trial court's scoring of a sentencing variable for an abuse of discretion." *People v Carrigan*, 297 Mich App 513, 514; 824 NW2d 283 (2012). The trial court's scoring decision will be upheld if there is any evidence to support it. *Id*.

The trial court erred in scoring 10 points for OV 4, which takes into account psychological injury to the victim. MCL 777.34(1). The victim's impact statement in the presentence report does not indicate that Pogue suffered a psychological injury, Pogue did not give a statement at sentencing, and the trial court did not find from Pogue's trial testimony or

demeanor on the stand that he suffered a psychological injury. Instead, it simply assumed from the extent of Pogue's physical injuries that he must have incurred some psychological injury as well. "The trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury '*occurred* to a victim.'" *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). (Emphasis in the original.) Accordingly, the trial court erred in scoring 10 points for OV 4.

We disagree with defendant's argument that the trial court improperly scored 50 points for OV 7, which takes into account "aggravated physical abuse" of the victim. MCL 777.37(1). Defendant was assessed 50 points, reflecting that the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). In multiple offender situations, the court must assess the conduct of each offender individually; the defendant cannot be assessed points based on the conduct of his confederates absent evidence that he participated in or encouraged that conduct. *People v Hunt*, 290 Mich App 317, 325-326; 810 NW2d 588 (2010). The trial court found that defendant participated in the multiple beatings inflicted on Pogue but nevertheless acquitted him of the torture charge. The scoring of the guidelines need not be consistent with the verdict because of the differing standards of proof. Thus, a given fact may be found to exist by a preponderance of the evidence for purposes of scoring the guidelines even though the same fact was found not to exist beyond a reasonable doubt for purposes of conviction. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003) vacated in part on other grounds 469 Mich 415 (2003); *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993) remanded 447 Mich 984 (1994). Because the record clearly establishes that Pogue was treated with sadism and excessive brutality within the meaning of MCL 777.37(1)(a), and defendant's participation in the multiple assaults against Pogue is supported by a preponderance of the evidence, the trial court did not err in scoring 50 points for OV 7.

Although we have determined that 10 points were erroneously scored for OV 4, that scoring error does not affect defendant's placement in OV Level VI on the applicable sentencing grid. MCL 777.64. Because the error does not affect the appropriate guidelines range, resentencing is not required. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra